No. 7745

In the

United States Circuit Court of Appeals

For the Ninth Circuit

SPOKANE, PORTLAND AND SEATTLE RAILWAY COMPANY, a corporation

Appellant

vs.

LEO H. MARTIN

Appellee

Brief of Appellant

Upon Appeal from the United States District Court for the Western District of Washington, Southern Division.

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STATEMENT OF THE CASE

This case is before the court on appeal from a judgment on a verdict of a jury for appellee, in an action to recover for personal injuries.

Appellee was employed in appellant's roundhouse and shops at Vancouver, Washington. He

was injured while working as one of a crew moving a pair of locomotive trailer wheels from a locomotive in the roundhouse to a lathe in the adjoining machine shop.

Appellee bases his right to recover on the provisions of the Federal Employers' Liability Act (U. S. C. A. 49:51 *et seq.*) which relates to injuries to employees of common carriers engaged in interstate commerce. There is no ground of jurisdiction in a federal court other than that the cause "arises under . . . the laws of the United States" (Judicial Code, Sec. 24; U. S. C. A. 28:41).

In its answer, and at the trial, appellant asserted that the court had no jurisdiction because appellee, at the time of his accident was not engaged in interstate commerce within the meaning of the Federal Act and had no rights thereunder. The refusal of the trial court to dismiss the action for want of jurisdiction is now assigned as error.

On the merits, appellant asserts that the court erred in declining to direct a verdict in its favor on the ground that appellee's injuries resulted from the risks of employment assumed by him. If appellee had a cause of action under the Federal Act, giving the court jurisdiction, then appellee's assumption of risk, if established, was a complete defense. It will be argued that the facts as stated by appellee and his own witnesses, prove that the

njuries resulted directly from hazards of which ppellee was aware, and that the risks of injuries herefrom were assumed by him.

Other errors assigned include the refusal of he court to instruct the jury, as requested, to vithdraw from the jury's consideration particular harges of negligence.

SPECIFICATIONS OF ERROR

1. The trial court erred in denying appellant's notion, made at the opening of the trial and be- ore the statements of counsel to the jury, and efore any evidence was received, to dismiss the ction upon the ground that the court had no urisdiction. (R. pp. 20-21, 117).

2. The trial court erred in denying appellant's notion, made at the trial after both parties had ested, to dismiss the case upon the ground that he court had no jurisdiction. (R. pp. 25-26, 118).

3. The trial court erred in denying appellant's notion, made at the close of all the testimony eceived upon the trial of this case, for an order irecting the jury to return a verdict in favor of ppellant upon the ground, among other things, hat it appeared affirmatively and as a matter of aw that the injuries received by appellee, as al- eged in his complaint, were proximately caused

by risks of the employment which were assumed by appellee. (R., pp. 26-27, 119).

4. The trial court erred in refusing to give to the jury an instruction requested by appellant, as follows:

> "In his complaint, plaintiff charges that the defendant was negligent in that the method adopted by the defendant's foreman in transporting trailer wheels was not reasonably safe by reason of the condition of the decking or flooring of the roundhouse, and by reason of the sprung condition of the truck upon which the wheels were being moved. I instruct you that the evidence shows that plaintiff, before he began the particular task in which he was engaged at the time of his alleged injury, was aware of the condition of the flooring and was aware of the condition of the truck which caused the truck to stick or stall while being used in the transportation of trailer wheels. Likewise plaintiff knew, or in the exercise of his ordinary powers of observation, should have known of the dangers incident to the condition of the floor and the condition of the truck. Consequently, plaintiff, when he began the task, assumed the risk of dangers arising from the condition of the floor and the condition of the truck. Since plaintiff assumed the risk of the dangers I have mentioned, he cannot recover from the defendant for injuries which he may have sustained on account of

the condition of the floor and the condition of the truck. For those reasons, the allegations of negligence with respect to the condition of the floor and the condition of the truck are withdrawn from your consideration and you cannot base any recovery by the plaintiff on those allegations of negligence.

(R., pp. 29-30, 120).

5. The trial court erred in refusing to give to the jury an instruction requested by appellant as follows:

"One of the allegations of negligence set forth in plaintiff's complaint is, briefly, that the defendant's foreman should have directed four men to take crowbars and to place the ends of the crowbars, two at the side of the forward end of the truck and two at the rear of the truck, and should have directed two men to hold the tongue of the truck to guide it, and that the foreman should then have given a signal for all workmen to lift and pry in unison. I instruct you that the evidence discloses that plaintiff was fully aware of the manner in which the work was being done in order to move the truck forward after it had stalled just before the plaintiff was injured, as he alleges. The dangers inherent in the method of work as actually done were as apparent to plaintiff as to the defendant or any of its employees. For that reason it follows that the plaintiff assumed the risk of injuries, if any, which may

have resulted from the fact that the method then adopted was being used. For that reason you cannot base any recovery by plaintiff upon the charge of negligence with respect to the number of men working on the truck at the time of the alleged accident and the charge with respect to the number of crowbars then being used."

(R., pp. 30-31, 121)

6. The trial court erred in refusing to give to the jury an instruction requested by appellant as follows:

"The complaint alleges, as one charge of negligence, that the defendant was negligent and careless in maintaining the floor in an uneven and worn-out condition and in using a truck the side of which was sprung, as alleged in the complaint. I instruct you that the dangers inherent in the operation of movement of the trailer wheels by the truck over the floor in its then condition, and with the truck in its then condition, were as apparent to the plaintiff as to the defendant and for that reason plaintiff assumed the risk of injuries resulting from the movement of the truck in its then condition over the floor in its then condition. For that reason you cannot base any recovery by plaintiff on the allegation of negligence with respect to the condition of the floor and the condition of the truck."

(R., pp. 32, 122)

7. The trial court erred in refusing to give to the jury an instruction requested by appellant as follows:

"The complaint alleges that the defendant was negligent in that the foreman, after adopting the method of movement of the truck in the manner alleged in the complaint, should have warned the plaintiff of the dangers of the truck moving forward as alleged in the complaint and should not have directed the plaintiff to work in the position described. I instruct you that the dangers inherent in the performance of the work as was done by the plaintiff after the truck had stopped were obvious to anyone using his ordinary powers of observation. For that reason there was no duty upon the defendant or its foreman to warn plaintiff of such dangers. There is no duty upon a master to warn a servant of dangers of the employment which are open and obvious and which should be discovered by the servant in the exercise of his ordinary powers of observation. Consequently that charge of negligence which I have just referred to is entirely withdrawn from your consideration and you are not permitted to base any recovery by the plaintiff on that charge of negligence."

(R., pp. 33, 123).

ARGUMENT

I.

The Trial Court Should Have Dismissed the Action for Want of Jurisdiction.

The first two specifications of error raise the question of jurisdiction of the federal court under the Federal Employers' Liability Act.

The sole ground upon which appellee bases jurisdiction of the federal court is that the cause "arises under the Constitution or laws of the United States." (Judicial Code, Sec 24; U. S. C. A. 28:41). The complaint alleges that appellee was an employee of defendant and was engaged in interstate commerce at the time of the accident. He seeks to recover under the provisions of the Federal Employers' Liability Act. (U. S. C. A. 45:51 et seq.). No other basis of federal jurisdiction was suggested.

An employee of a common carrier can maintain an action under the Federal Employers' Liability Act only if he was engaged in interstate commerce at the time of his injury. If a plaintiff, by an action in a federal court, seeks to recover under the provisions of the Act, and if at any step in the pro-

ceedings it appears as a fact that at the time of the accident he was not engaged in interstate commerce, the court must dismiss the case, without prejudice, for want of jurisdiction. *Rice v. Baltimore & Ohio R. R. Co.*, 42 F. (2d) 387; (6th C. C. A.); *Steidle v. Reading Co.*, 24 F. (2d) 299; (3rd C. C. A.); *Chicago & Alton R. Co. v. Allen*, 249 Fed. 280; (7th C. C. A.); *Central R. of N. J. v. Colasurdo*, 192 Fed. 901, (2nd C. C. A.)

Appellant raised the jurisdictional question by its answer, wherein it was alleged that appellee was not engaged in interstate commerce at the time of the accident, by its motion to dismiss for want of jurisdiction, made at the trial before the jury was empaneled, and by a similar motion made at the close of the testimony. (R. pp.14, 20-22, 25-26).

Whether the trial court erred in denying these motions depends on the answer to the single question: Was appellee, at the time of the accident upon which he bases his claim for recovery, engaged in interstate commerce within the meaning of the Federal Employers' Liability Act?

The broad test to determine whether appellee was within the Act was stated by Mr. Justice Van

DeVanter, in *Shanks v. Delaware L. & W. R. Co.*, 239 U. S. 556, 36 S. Ct. 188, in the following language:

> ". . . the true test of employment in such commerce in the sense intended is, was the employee, at the time of the injury, engaged in interstate transportation, or in work so closely related to it as to be practically a part of it?"

The Act has been before the federal and state courts in literally hundreds of cases which required the answer to the question whether an employee was so engaged. Although each case must be decided in the light of its particular facts (*New York Central & H. R. R. Co.v. Carr*, 238 U. S. 260, 35 S. Ct. 780), and although no precise test can be phrased which will permit an automatic answer in every situation (*Industrial Accident Commission v. Payne*, 259 U. S. 182, 42 S. Ct. 489), it is nevertheless true that in the long history of construction of the Act by the Supreme Court, very definite conclusions have been stated, and when the question has arisen in later cases involving similar facts, the same principles have been applied.

By that process, as we will show, the principles applicable to the facts in the present case have been fixed by the Supreme Court in a series of cases involving injuries to shop employees engaged

in repairs of locomotives. An application of the established rules to the present facts will compel the conclusion that appellee was not engaged in interstate commerce at the time of his alleged injuries.

At the time of the accident appellee was a member of a crew of seven or eight workmen engaged in moving a pair of locomotive trailer wheels from an engine at a drop pit in appellant's roundhouse to a lathe in the adjoining machine shop where the tires were to be turned. (R., pp. 42, 43, 81). It was contemplated that when the repairs on the wheels were completed, the wheels would be returned and replaced on the same locomotive. (R., pp. 81, 82).

Engine No. 622, from which the wheels were removed, was of a type suitable for passenger train service. The last transportation service in which it was used prior to the accident was on the morning of April 16, 1932, on an interstate passenger train. On arrival of that train at Vancouver, Washington, at 7:05 A. M. of April 16, the engine was detached from the train and moved to the roundhouse at that point. The next transportation service in which it was used was on the morning of April 23, to haul another interstate passenger train.

In the interval from the 16th to the 23rd, it was in the roundhouse undergoing repairs. (R., pp. 34, 35). The accident upon which plaintiff bases his action occurred on April 22. (R., pp. 5-7).

At the time of its arrival at Vancouver, the morning of the 16th, it was reported by the engineer who had been operating it on its last trip that "lower rail of engine frame broken left side just over engine truck wheel." That defect was of such a nature that the engine was not in a safe condition for further service and would not be until the defect had been repaired. (R., pp. 36, 37).

While in the roundhouse numerous repairs were made, including repair of the engine frame, a boiler wash, removal of trailer wheels for turning "on account of shelling", calking of steam leak and replacement of brick on the back wall, and some twenty other repairs of varying importance. Upon removal of the trailer wheels, which appellee was assisting in moving at the time of his alleged injuries, the locomotive was not in condition for use in any transportation service. (R., pp. 37-39).

Engine No. 622 was one of a group owned by appellant and used in passenger service, and, when in service, was customarily used on passenger trains

Nos. 1 and 2 between Spokane, Washington, and Portland, Oregon. A normal cycle of use of an engine engaged continuously in that service consumed parts of four days. If the engine had remained constantly in service on trains Nos. 1 and 2 during the time it was in the roundhouse, its schedule would have been as follows:

April 16—Taken off No. 1, westbound, at Vancouver, 7:05 A. M. and removed to roundhouse.

April 17—Leave roundhouse to haul No. 1, westbound, from Vancouver to Portland in the morning. Remain in Portland during the day. Leave Portland in the evening on No. 2, eastbound for Spokane.

April 18—Arrive Spokane in the morning. Remain in Spokane during the day. Leave Spokane in the evening on No. 1, a train scheduled for movement to Portland.

April 19—Arrive at Vancouver on No. 1 in the morning. Remove from train and replace by another locomotive. Take to roundhouse to begin another cycle.

April 20—Same service as 17th.

April 21—Same service as 18th.

April 22—Same service as 19th, completing a second cycle of use.

April 23—Same as 17th and 20th, to begin a third cycle of use.

(R., pp. 35-36).

Since the engine was actually in the roundhouse undergoing repairs from April 16 until the morning of the 23rd, when it was used to move No. 1 from Vancouver to Portland, it was out of all transportation service during a period in which it could otherwise have been used in two complete cycles of use —two round trips—between Portland, Oregon, and Spokane, Washington.

Although Engine No. 622 was "customarily used" on No. 1 and No. 2 interstate passenger trains (R., p. 35), its use in that service was not exclusive. Both before and after the date of appellee's accident, April 22, 1932, it was used in local freight service and stock service. Local freight service means "a train that goes out to handle the local freight along the line between Vancouver and Wishram", entirely within the State of Washington. Likewise, it was used locally between Vancouver and Camas, Washington. (R., p. 79). As stated by the roundhouse foreman:

> "We have used that engine to go up there (Camas) when our local was late to bring in freight from this paper mill when it was required. Because of our local train being late, we would have to go out and bring in this freight in order to connect with the Great Northern connection in our yards for move-

ment north to Seattle. The Great Northern line from Vancouver to Seattle does not lie outside of the State of Washington." (R., pp. 79-80).

The accident in this case occurred in the morning. (R., p. 80). Assignments for use of engines are made in the afternoon "around 4:00 o'clock". The engine was not assigned to any future service at the time appellee was working on the wheels, and at that time it was not known what the next service of the engine would be. (R., pp. 80-81).

It appears, therefore, that appellee was injured while working on the repair of a locomotive, out of transportation service and in the roundhouse; the engine was used most often in interstate service, but it was not exclusively so used; and at the time of the accident it was not determined whether its next transportation service would be in interstate or intrastate commerce. While so engaged, we submit, appellee was not engaged in interstate commerce within the meaning of the Federal Act, and cannot base a right to recover on the provisions of the Act.

This case is squarely within the principles stated by Mr. Justice Holmes in *Minneapolis & St. Louis Railroad Company v. Winters*, 242 U. S. 353,

37 S. Ct. 170. In that case plaintiff, an employee, was injured while repairing an engine. The engine had completed an interstate run before the accident, on October 18, and was next used after the accident on an interstate run on October 21. It was held that plaintiff, at the time of the accident, was not engaged in interstate commerce within the meaning of the Federal Employers' Liability Act. The court said:

> " . . . An engine, as such is not permanently devoted to any kind of traffic, and it does not appear that this engine was destined especially to anything more definite than such business as it might be needed for. It was not interrupted in an interstate haul to be repaired and go on. It simply had finished some interstate business and had not yet begun upon any other. Its next work, so far as appears, might be interstate or confined to Iowa, as it should happen. At the moment it was not engaged in either. Its character as an instrument of commerce depended on its employment at the time, not upon remote probabilities or upon accidental later events."

The *Winters* case is controlling and compels the conclusion that appellee in this case was not engaged in interstate commerce at the time of his injuries. The only fact shown in this case which was not present, or at least not discussed by the court, in the *Winters* case, is that the engine on

which appellee was working was "customarily" used in interstate service. But that fact does not change the result in this case. Indeed, it has been held that the fact that an engine is used *exclusively* in interstate commerce is not sufficient to bring an employee, engaged in its repair, within the Federal Act.

In the leading text on the subject, Roberts' Federal Liabilities of Carriers, the author states (Vol. 2, (2d Ed.), p. 1471):

> "However, the mere fact that an engine or car being repaired is, when in use, exclusively used in and devoted to interstate service, is not sufficient to bring under the act employees who participate in making such repairs. The impression to the contrary, obtained by some courts from the decision of the national Supreme Court in the Winters case, *ante*, was impliedly corrected by the memorandum opinion of that court in reversing a judgment of the Circuit Court of Appeals (Chicago, K. & S. Ry. Co. v. Kindlesparker, 234 Fed. 1, 6th C. C. A., reversed in a memorandum opinion on the authority of the Winters case, in 246 U. S. 657, 38 S. Ct. 425), but was definitely controverted in the later case of Industrial Accident Commission of California v. Payne (259 U. S. 182, 42 S. Ct. 489), . . ."

The case of *Chicago, K. & S. Ry. Co. v. Kindlesparker*, 234 Fed. 1, decided by the Circuit Court

of Appeals for the Sixth Circuit shortly before the decision in the *Winters* case, involved injuries to an employee while engaged in repairing a locomotive, which, when in service, was used indiscriminately in interstate and intrastate service. The lower court held that he was engaged in interstate commerce. The theory of the Circuit Court of Appeals was expressed in the following language:

> "The nature and effect of such service as this, both before and after the period of repair, now becomes still more evident. It was the same double service to which the road and yards and (when in use) all the engines of the company were alike constantly devoted; the strong tendency of the evidence is that the service was uniformly of such a nature that the engine in issue could not at any time have been placed in use at all (it certainly was not put in use) except in this double and unitary character of service—if indeed this was not true as to all the engines. The inevitable effect of this service was to impress every instrumentality, so used, with an interstate character, . . ."

The case was reversed by the Supreme Court on the authority of the *Winters* case. (246 U. S. 657; 38 S. Ct. 425).

In *Industrial Accident Commission v. Payne*, 259 U. S. 182, 42 S. Ct. 489, plaintiff was injured

while working in the shops on an engine "that had been employed in interstate commerce and which was destined to be so employed again." The engine was placed in the shop on December 19 for repairs which were expected to be completed on January 31. They were actually completed on February 25. The engine was given a trial run and was placed in interstate service on March 4. Plaintiff was injured on February 1. The court held that he was not engaged in interstate commerce at the time of his injury. The court said:

> ". . . But equipment out of use, withdrawn for repairs, may or may not partake of that character according to circumstances, and among the circumstances is the time taken for repairs—the duration of the withdrawal from use. Illustrations readily occur. There may be only a placement upon a sidetrack or in a roundhouse—the interruption of actual use, and the return to it, being of varying lengths of time, *or there may be a removal to the repair and construction shops, a definite withdrawal from service and placement in new relations;* the relations of a workshop, its employments and employes having cause in the movements that constitute commerce but not being immediate to it.
>
> *"And it is this separation that gives character to the employment,* as we have said, as being in or not in commerce. Such, we think, was the situation of the engine in the present case." (Italics ours).

Further, the court disapproved the conclusion of the Circuit Court of Appeals in the *Kindlesparker* case, *supra,* that

> ". . . the test of the work was the instrument upon which it was performed, not the time of withdrawal of the instrument from use."

The latest decision of the United States Supreme Court applying the rule of the *Winters* case, and the most important for present purposes, as it is most nearly in point on its facts, is *New York, New Haven & Hartford Railroad Co. v. Bezue,* 284 U. S. 415, 52 S. Ct. 205. Plaintiff therein was employed by defendant as one of a gang of laborers in defendant's repair shops, and at the time of his injury was engaged in moving a pair of engine driver wheels from a lathe in the machine shop, where the journals of the wheels had been turned, to the engine pit in the roundhouse where the wheels were to be placed upon the engine. The engine came into the shop on August 23, and had been set aside for a customary boiler wash to be given to all engines every thirty days. Preparatory to the boiler wash an inspection was made and orders issued for certain work which included

> ". . . the removal of the main driving wheels and shifting them to the hoist shop so that the

> journal might be turned, the transfer of several parts to the machine shop, the separation of the jacket from the fire box, the replacement of some four hundred seventeen leaking bolts, the renewal of bushings, and other items requiring skilled labor. The fire was dumped, the main driving wheels and other portions needing attention were removed, and the engine was left inert and incapable of locomotion."

The repairs consumed twelve days. The plaintiff was injured on September 2, the ninth day after the engine had come into the shop. Plaintiff sought to recover under the Federal Employers' Liability Act. The state court of New York held that the plaintiff was engaged in interstate commerce at the time of his injuries upon the ground that plaintiff was engaged in plant service and worked indiscriminately upon engines used in interstate and intrastate commerce. Judgment for the plaintiff was reversed by the Supreme Court. The Supreme Court applied the rule of the *Winters* case and of *Industrial Accident Commission v. Payne, supra* (cited in the decision in the *Bezue* case as *Industrial Accident Commission v. Davis*). Mr. Justice Roberts, in delivering the opinion of the Court, said:

> ". . . Under the circumstances of this case, whether respondent is within the act must be

decided, not by reference to the kind of plant in which he worked, or the character of labor he usually performed, *but by determining whether the locomotive in question was, at the time of the accident, in use in interstate transportation or had been taken out of it.* The length of the period during which the locomotive was withdrawn from service and the extent of the repairs bring the case within the principal announced in Industrial Accident Comm. v. Davis (259 U. S. 182, 42 S. Ct. 489), and Minneapolis & St. Louis R. Co. v. Winters, . . . stamp the engine as no longer an instrumentality of or intimately connected with interstate activity, and distinguish such cases as New York Cent. R. Co. v. Marcone, 281 U. S. 345, 50 S. Ct. 294, where the injured employee was oiling a locomotive which had shortly before entered the roundhouse after completing an interstate run.

"Respondent endeavors to support the claim that here the instrumentality had not been taken out of interstate commerce, by reference to the practice of petitioner, which is that work, sometimes greater and often less in amount than in this case, is done at Maybrook in connection with the monthly boiler wash; whereas, after a locomotive has run thirty-five thousand miles, or eighteen months, it is marked for out of service repairs, and is sent to petitioner's general repair shop at Readville, Mass. The argument is that the railroad company thus recognizes that such work as is done at Maybrook in conjunction with boiler washing is incidental and does not take the engine out of service.

"We do not think this custom warrants a

> disregard of the proved facts, and the adoption of an artificial classification of the locomotive as one in service at the time of respondent's injury. . . ." (Italics ours).

The facts in the *Bezue* case are surprisingly similar to those before the court. There, as here, the repairs performed while the engine was in the shop were what are known generally as "running repairs", rather than general overhauling. (R., p. 87). In both cases, the engines were inert and incapable of locomotion because they were not fired up and particularly because some of the wheels had been removed. Likewise, in both cases plaintiffs were injured in transporting wheels of the locomotive which had been removed,— in the *Bezue* case, from the lathe where they had been turned to the pit where they were to be replaced on the engine, and in the present case, from the pit where they had been removed to the lathe to be turned and subsequently reapplied to the engine. In the *Bezue* case, plaintiff was injured on the ninth day, whereas, in this case, appellee was injured on the seventh day that the engine was in the shop.

It is significant that in the *Bezue* case, the court did not feel that it was necessary to dis-

cuss the use to which the locomotive was ordinarily put while in service, that is to say, whether exclusively in interstate commerce or indiscriminately in intrastate and interstate commerce. Under the reasoning of the court, that fact was immaterial, and the decision would have been the same even though it had appeared that the engine when in use was used exclusively in interstate service. The significant facts were not the character of the use of the engine while in service, but rather, the manner and purpose and time of its withdrawal from all service.

In denying appellant's motion to dismiss, made at the opening of the trial, the court apparently rested its conclusions upon two facts—first, that the engine was one used in interstate commerce, had been so used immediately before going to the shops, and was intended to be returned to that use, and second, that the wheels were being moved *away from* the engine to the machine shop, whereas in the *Bezue* case, the wheels were being moved from the lathe after completion of the work *to* the engine. (R., pp. 21-22).

The authorities cited indicate that the first of these two grounds does not justify the conclusion

of the trial court. In *Industrial Accident Commission v. Payne, supra*, the engine "had been employed in interstate commerce and . . . . was destined to be so employed again." Nevertheless, it was held that the repairman was not engaged in interstate commerce. The mere fact that an engine, while in use, is used exclusively in interstate service, is not sufficient to bring an employee who is engaged in repairing it within the provisions of the Federal Act. Much less does the mere fact that the last use before the accident, and the first use following the accident, were in interstate commerce, support the court's conclusion. *Minneapolis & St. Louis R. Co. v. Winters, supra.*

In fairness to the trial court, it should be noted that the grounds on which it acted were stated when there were before it only the facts as to "customary" use of the engine, based on the stipulation, Exhibit 4. (R., pp. 20-22, 34-40). The court did not then have the evidence of use in intrastate commerce, later stated in the testimony of Witness Morrison. (R., pp. 79-81). Apparently the court made the same error as did the Circuit Court of Appeals of the Sixth Circuit in the

Kindlesparker case, upon which the text writer, hereinbefore quoted, commented.

Furthermore, the second ground upon which the court acted is likewise insufficient. If an engine is brought to the shop for service between two interstate runs and is not withdrawn from use except for that purpose, it may be that an employee who is engaged in work upon it is engaged in interstate commerce within the Act, under the principle applied in the *Marcone* case cited in the quotation in preceding pages from the *Bezue* case. On the contrary, if the engine is brought in for repairs of the nature shown in the *Bezue* case and in this case, and is withdrawn from all service as was done here, then a repairman is not within the Act; and that is true whether the accident happens five minutes after the engine is definitely withdrawn from service or five minutes before it is definitely replaced in service. In the present case, as soon as it was determined that repairs were to be made of a nature constituting a withdrawal from service, the engine was at that instant withdrawn from service and any injury to an employee after that moment could not be within the act.

It is difficult to see how, in the *Bezue* case, the court could have reached a different conclusion if the facts had shown that the plaintiff was injured in moving the wheels *away* from the engine on the seventh day after withdrawal from service (which is the fact in the case at bar) instead of while moving the wheels *back to* the engine on the ninth day. If there could be any possible distinction arising from that fact, it would seem that the facts in this case more strongly support the conclusion that the appellee was not engaged in interstate commerce than the facts in the *Bezue* case. In the present case, the act of taking an essential part *away* from the engine tended to make the engine, to that extent, less capable of furnishing transportation service; whereas, in the *Bezue* case, the act of taking some part *to* the engine to attach it tended to make the engine, to that extent, more nearly capable of rendering transportation service.

Upon the authority of the *Winters* case, as interpreted in subsequent decisions of the Supreme Court, and particularly upon the authority of the *Bezue* case, the conclusion is inevitable that the appellee, at the time of the injuries of which he complains, was not engaged in interstate com-

merce within the meaning of the Federal Employers' Liability Act.

There have been several decisions of the lower federal courts applying the principles controlling this action. The cases, of course, are widely variant in their facts, but the principles are the same. There are many decisions relating to repairs of equipment other than locomotives, but we have limited ourselves to citation of decisions involving repairs to engines.

For decisions of the lower federal courts, see *Connolly v. Chicago, M. & St. P. Ry. Co.*, 3 Fed. (2d) 818 (a decision of Judge Neterer of the District Court of Washington); *Baltimore & Ohio Railroad Co. v. Kast,* 299 Fed. 419 (6th C. C. A.), and *Chicago & Alton R. R. Co. v. Allen,* 249 Fed. 280 (7th C. C. A.).

The same question has been raised in several decisions of state courts. Thus, in *Chicago R. I. & P. Ry. Co. v. Cronin,* 74 Okla. 38, 176 Pac. 919, the facts showed that the engine upon which plaintiff was engaged was one which, when in service, pulled an interstate train. At the time of the repairs, the engine was in the shop and was "dead". The repairs were completed in time for the engine to

make its next regular trip from Sayre, Oklahoma, to Amarillo, Texas. The court held that plaintiff was not engaged in interstate commerce. Another case, reaching the same conclusion, is *Larkin v. Industrial Commission of Utah*, 60 Utah 274, 208 Pac. 500, wherein it was shown that the engine on which plaintiff was making repairs was used exclusively in interstate commerce. Another case is *New Orleans & Northeastern Railroad Company v. Beard*, 128 Miss. 172, 90 So. 727. (Certiorari denied 260 U. S. 752, 43 S. Ct. 10). There the engine was one of a group of five purchased by defendant for the sole purpose of use on interstate runs. Four of the group were constantly in use and one was usually in the shop. Again it was held that plaintiff was not engaged in interstate commerce. In *Detroit & T. Shore Line R. Co. v. Seigel* (Ohio App.), 153 N. E. 870, the engine was in the shop for six days for a washout and repairs. It was used before and after shopping in interstate commerce. The Ohio court held that plaintiff was not within the Act. In *Chesapeake & Ohio Railroad Co. v. Mizelle*, 136 Va. 237, 118 S. E. 241, the engine was an extra passenger engine which, when in use, was used on regular interstate trains. It was held that plaintiff was not within the Act. In

Conklin v. New York Central Railroad Company, 206 App. Div. 524, 202 N. Y. S. 75 (affirmed 238 N. Y. 570, 144 N. E. 895; certiorari denied 266 U. S. 607, 45 S. Ct. 93), the engine was last used before plaintiff's accident on an interstate run, but was generally used indiscriminately within the state on interstate and intrastate trains. It was in the shop for five days for repair of tires. It was held that plaintiff, while engaged in work on that engine, was not within the Act.

Since the only ground relied on for the exercise of jurisdiction by a federal court in this case is that the case arises under the Federal Employers' Liability Act, and since, from the uncontroverted facts, it appears that plaintiff was not engaged in interstate commerce within the Act, the judgment in this case should be reversed, with directions to dismiss the case without prejudice for want of jurisdiction.

II.

Failure of the Court to Direct a Verdict for Appellant.

The third specification of error goes to the merits of the case. Therein appellant asserts that

the trial court erred in overruling appellant's motion for a directed verdict made upon the ground, among others, that appellee's injuries resulted from risks of the employment assumed by him.

The asserted ground of federal jurisdiction is that appellee was engaged in interstate commerce at the time of the accident and had a cause of action under the Federal Employers' Liability Act. Assuming the existence of such a cause of action, any defense available under the Act was open to appellant.

In a case under the Act, the employee cannot recover if the injury resulted from a risk of the employment assumed by him. The Act has been construed on many occasions by the Supreme Court and it has been held uniformly, with exceptions not now applicable, that the Act left intact the common law defense of assumption of risk. *Seaboard Airline Railway Company v. Horton*, 233 U. S. 492, 34 S. Ct. 635; *Missouri Pacific Railroad Company v. David*, 284 U. S. 460, 52 S. Ct. 242.

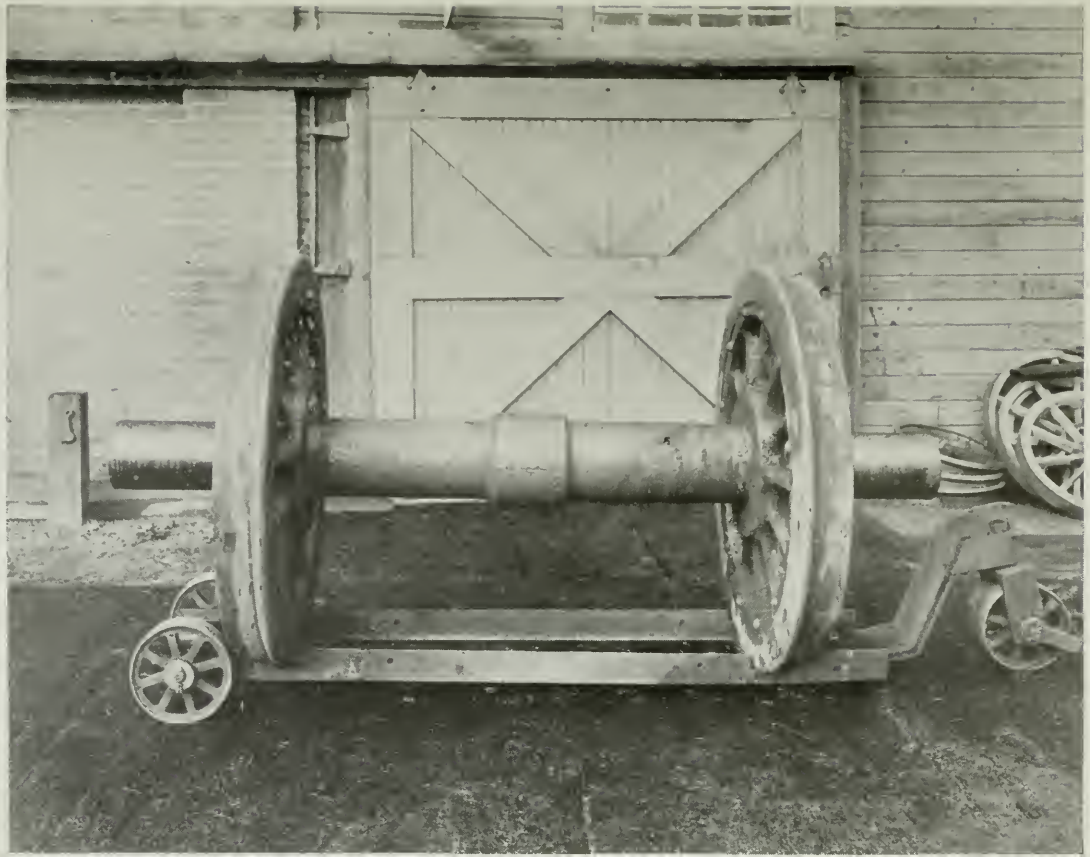
All ordinary risks of a particular occupation are assumed by the employee. Likewise unusual and extraordinary risks are assumed when the existence of the risk is known to the employee or

should be known to him in the exercise of his ordinary powers of observation and he continues his work with that knowledge. Even though the risk is created by the negligence of the master, it is assumed by the servant who, with knowledge thereof, proceeds with his task. *Seaboard Airline Railway Company v. Horton, supra; Delaware & Lackawanna Railroad Co. v. Koske,* 279 U. S. 7, 49 S. Ct. 202; *Toledo, St. Louis & Western Railroad Company v. Allen,* 276 U. S. 165, 48 S. Ct. 215; *Columbia & P. S. R. Co. v. Sauter,* 223 Fed. 604 (9th C. C. A.); *Chicago, M. & St. P. Ry. Co v. Busby,* 41 Fed. (2d) 617 (9th C. C. A.).

For our present purposes, we will assume that appellee's account of the accident and its surrounding circumstances is correct. There were several conflicts in the testimony as given by appellee and his witnesses and by appellant's witnesses. In this brief, all testimony which conflicts with that of appellee, or of witnesses called by him, will be disregarded. Based solely on the testimony of the appellee and his witnesses, it will appear, we submit, that appellee assumed the risks of the injuries of which he now complains.

Appellee was injured in appellant's roundhouse at Vancouver, while engaged with others of a crew of workmen in moving a pair of engine wheels loaded on a steel truck. Four photographs, defendant's Exhibits A-1 to A-4, inclusive, show the truck and the manner in which the wheels were loaded thereon. (R., pp. 41 - 42). Plaintiff's Exhibit 1 is a wooden model of the truck and the trailer wheels. (R., p. 40). These exhibits, the photographs and the model, are a part of the record on this appeal by stipulation of counsel and order of the trial court. (R., pp. 113-115). For convenience, the four photographs are here reproduced.

Defendant's Exhibit A-1



As the detailed summary of the evidence will show, appellee voluntarily took a position between the front and the rear of the two trailer wheels. He stood immediately in front of the rear wheel and was injured when the wheel was moved forward as the result of the combined efforts of members of the crew. As will appear, the situation is precisely the same as though appellee had stood between the front and rear wheels of a wagon, had exerted his efforts to move the front wheel and was struck and injured by the rear wheel which necessarily moved simultaneously with the front wheel. In those circumstances the danger of being struck by the rear wheel was open and apparent, and, as a matter of law, was assumed by appellee.

The crew which was engaged in moving the truck included seven or eight men. (R., p. 43). One or two men were holding the tongue of the truck. One or two men were at the rear end of the truck pushing against the rear of the two trailer wheels. (R., p. 44). Appellee and another were pushing on the forward of the two trailer wheels, one on each side of the axle. Appellee was on the right side of the axle and the other workman was on the left side of the axle. (R.,

pp. 53, 56). Appellee, then, was between the front and rear trailer wheels, walking along pushing on the forward of the two wheels. The roundhouse foreman, Morrison, was accompanying the loaded truck. (R., pp. 44, 45).

As the truck was being moved over the plank floor of the roundhouse, because of the small clearance between the floor and the bottom of the channel iron forming a part of the truck, the bottom of the channel iron encountered an irregularity in the floor and the truck was stopped. (R., p. 44). Appellee was directed by the foreman to procure a crowbar to use to dislodge the truck. (R., p. 44). Appellee got the bar and attempted to pry by placing the bar under the forward trailer wheel. (R., p. 46). While in a position first assumed by him, he tried to pry once or twice, but was unsuccessful in dislodging the truck because his bar slipped on the tire of the trailer wheel. (R., p. 46). Without any further direction from the foreman, appellee took a different position. (R., p. 46). He assumed a position immediately between the two trailer wheels on the right side of the axle, facing the forward trailer wheel. His back was against the axle and he was facing somewhat away from the axle. (R., p. 53). His left

foot was forward. His right foot was approximately 24 inches back of his left foot and his rear foot was "pretty close to four feet from the flange of the forward wheel". (R., pp. 53-54). The bar was in front of him, with the result that his body was between the crowbar and the axle of the trailer wheels. (R., p. 53).

The distance between the trailer wheels to the outside of the flanges was four feet eight and one-half inches, and the distance between the inside of the flanges was four feet six inches. (R., p. 54). Necessarily, since his rear foot was "pretty close" to four feet from the flange of the forward trailer wheel, it was then "pretty close" to six inches from the rear wheel. That his rear foot was very close to the rear wheel which later struck him, becomes apparent to anyone who will conduct the experiment of placing himself in a restricted space, only four and a half feet wide, and in a position to handle a crowbar six feet long. (R., p. 54).

While in that position he inserted the point of his bar under the forward trailer wheel and raised on the bar to dislodge the truck by lightening the load on the truck to increase the clearance between the truck and the floor. (R., pp. 46, 47). At the same time other members of the crew at the rear

of the truck and at the forward wheel on the opposite side of the axle from appellee were pushing to move the cart forward. (R., pp. 55, 56). The crew was successful in dislodging the truck and it moved forward. Appellee's right foot, being within a few inches of the rear trailer wheel, was struck by it when the truck moved forward, and appellee was injured. (R., pp. 46, 47).

The complaint alleges in effect that the truck was defective because it had sprung so that one side had a clearance above the floor of no more than half an inch. (R., p. 5). It alleges further that the plank floor was worn and decayed and was rough and uneven and "knots were sticking up" and further, in order to bring the planks even with the top of the rails of a track, the ends of the planks next to the rails had been hewn or beveled so that there was an incline on the decking running toward the rails. (R., pp. 3-4).

The negligence specifically charged to the appellant consisted of the following:

1. The method adopted for moving the trailer wheels was unsafe due to the condition of the truck and the plank decking.

2. After the truck had become "caught" appellant should have directed the use of four crowbars to pry the trailer wheels forward and should have directed four men thus equipped to work in unison.

3. Appellant was negligent with respect to the state of maintenance of the truck and of the decking.

4. Appellant's foreman should have warned the appellee of the danger of the truck moving forward down the incline.

5. Appellant's foreman should not have directed appellee to work in the position in which he was at the time of the accident. (R., pp. 8-9).

These charges of negligence can be grouped under the following headings:

1. Charges relating to the condition of the truck and the condition of the floor.

2. Charges relating to the method adopted to dislodge the truck and to get it in motion after it had stopped.

3. Charges relating to the failure of the foreman to warn appellee of danger and to the instructions as given by the foreman.

We submit that if there were any negligence in the respects charged, the risks resulting therefrom were open and apparent and were known to appellee, or should have been known to him in the exercise of his ordinary powers of observation, and were assumed by him when he continued with his work.

A. Charges of Negligence Relating to the Condition of the Floor and of the Truck.

In the first place, it is obvious that the condition of the floor and of the truck had nothing to do with the accident. Appellant's conduct in this respect. even though negligent, was not a proximate cause. Negligence which merely created a condition in which appellee acted was not the proximate cause of the accident. The condition of the floor and of the truck, at the most, caused the truck to become stalled as it was moved across the floor, but after the truck became stalled, there was no danger to the appellee or other members of the crew until some further act was performed. The truck could have remained in the stalled condition indefinitely and no one would have been injured. The accident occurred only as a result of the

intervening acts of appellee himself and other members of the crew in their efforts to dislodge the truck. It is held uniformly that negligence which merely creates the condition is not the proximate cause of an accident. *O'Connor v. Brucker,* 117 Ga. 451, 43 S. E. 731; *Curran v. Chicago & W. I. R. Co.,* 289 Ill. 111, 124 N. E. 330; *Fraser v. Chicago R. I. & P. Ry. Co.,* 101 Kans. 122, 165 Pac. 831; *Bohm v. Chicago, M. & St. P. Ry. Co.,* 161 Minn. 74, 200 N. W. 804, (Cert. denied, 267 U. S. 600, 45 S. Ct. 355); *Davis v. Carolina Cotton & Woolen Mills Co.,* 5 Fed. (2d) 575; *Saunders v. Boston & Maine R. Co.,* 82 N. H. 476, 136 A. 264; 45 Corpus Juris 931.

But even if it could be contended that the condition of the floor and of the truck was a proximate cause of appellee's accident, nevertheless appellee cannot recover because the risks created thereby were well known to appellee and he assumed them when he proceeded with his work with that knowledge.

To demonstrate that appellee was aware of the risks thereby created, we shall summarize his own testimony on this subject. On direct examination he testified substantially as follows:

". . . The state of repair of the planking was very poor. The planking has knots along it, quite a few knots, and then they use pretty good sized spikes to drive that down, and there are places from dragging such things as the truck over the floor where the floor was wore down and these knots stick up and then some of the nails stick up and bend over where you run into them." (R., p. 42).

"When the truck was empty, the distance from the channel iron to the floor was around an inch. When it was loaded, one side was lower than the other because it was sprung out of shape on this side where it was cut. After the truck was loaded, I could not say exactly the distance between the channel iron and the floor, but it was probably around a half inch . . ." (R., p. 43).

On cross examination he testified as follows:

". . . I knew for a long time that the floor was rough from the movement of heavy machinery over it, and I had seen these bumps in the floor caused by knots in the plank many times, and I had seen these places where nails were sticking up in the floor many times before this accident happened." (R., p. 49).

"Q. It was not very much about that plank flooring that you did not know about, was it? You knew things fairly well before this thing happened, didn't you?

A. Yes, I knew the condition of it." (R., pp. 49-50).

"The accident happened near the time clock. I had to go to the time clock at various times of the day to punch the clock, and I had been

> over the floor near the point where the accident happened on many occasions on each of the prior days. I had had plenty of opportunities to learn the condition of the floor. I had gone over that part of the floor where this slope was located a good many times. I had walked across it, and if I had glanced down at the floor I would have noticed the condition of the floor at that point. There was nothing concealed or hidden. The condition was right on the surface of the floor." (R., p. 50).

The fact that the floor was rough and uneven and the fact that the truck was constructed with very little clearance had nothing to do with the occurrence of the accident except as the combination of the two circumstances caused the truck to become stalled as it was being moved over the uneven floor. The condition of the floor and of the truck created no hazard except as the two circumstances increased the tendency of the truck to stall when it encountered some protuberance or interference.

But this tendency of the truck to stop as it was being moved over the floor because of the combination of the two circumstances was well known to the appellee. He testified as follows:

> "I had worked on many occasions moving wheels on this truck, and pretty close to every time we moved it, the truck got stuck some

> place along the floor, and I knew when I began to move the truck that it was liable to stick somewhere along the floor, and that was the customary experience in using the truck, and I had all of that knowledge prior to the time that we started moving the truck at the time of the accident. But I was never stuck in that particular place, but it had stuck in numerous other places along there. It stuck at numerous other places around the roundhouse floor, and I knew all of that before the accident happened on April 22, 1932." (R., p. 53).

Here, then, is positive testimony from the appellee himself that prior to the accident he was fully aware of two facts, first, the condition of the truck and of the floor, and second, the probability that what did happen, would happen, that is, that the truck would be stalled because of the small clearance. In many cases an employee may be aware of a condition which creates a hazard, but does not fully appreciate the particular form in which the hazard will exhibit itself, and it is nevertheless held that he assumes the risk. The present case is a stronger one because appellee knew the precise condition which created the hazard, and likewise, the precise manner in which the hazard would become operative.

The remaining point, with respect to the condition of the floor, involves the fact, to which ap-

pellee testified, that at the particular location where the truck stalled on this occasion the floor was sloping so that while the rear wheel of the truck was on the level, the front wheel of the truck was on an incline. As a result of this, so he states, when he and the other workmen engaged with him dislodged the truck to move it forward, the forward end moved down the "little slope" and the loaded truck moved forward a distance greater than appellee anticipated. (R., pp. 46, 55, 58).

The trailer wheels which were being moved weighed over two tons. (R., p. 41). About seven or eight men were engaged in the work. (R., p. 43). As appellee used the crowbar to dislodge the truck after it was stalled, other members of the crew were exerting their efforts by pushing to assist in dislodging the wheels to move them forward. (R., pp. 52, 55, 56). Appellee testified:

> ". . . When I raised up on there, the cart shot ahead. Ordinarily when I would use a bar it would move probably the length of the bite I had, just get off the bar and then stop, but at this particular place, there is a little slope there where it goes down to the tracks, and where the rail comes through there, and I may be behind the wheels when I was coming along there pushing, I was not paying any attention

to what was ahead of it because we never moved fast enough to run over anything, . . ." (R., p. 46).

But the appellee knew of the existence of this slope in the floor. He testified:

". . . I had gone over that part of the floor where this slope was located a good many times. I had walked across it, and if I had glanced down at the floor I would have noticed the condition of the floor at that point. There was nothing concealed or hidden. . . ." (R., p. 50).

He testified further on cross examination:

"Q. But, despite the fact you walked by them many times each day, you never noticed it sloped until after the accident, had you, is that right?

A. Well, before—just walking along there, you would notice it every time, but this cart at this time, and the wheels on it, you could not notice, or I did not notice it.

Q. Well then, your answer is, standing behind this wheel you forgot that slope, isn't that about it?

A. I was busy working. I was not looking for any slope.

* * * * *

Q. So, that you knew the slope was there, but you could not see it from the position in which you were standing when you were working on the wheels at this time, that is correct, is it not?

A. Yes, sir." (R., pp. 50-51).

However, on recross examination he admitted that as he stood two or three feet from the forward trailer wheel, there was nothing to prevent his seeing the floor where it sloped on the other side of the wheel. (R., pp. 59, 60). That this was true is apparent from a glance at the photographs of the loaded truck, particularly Exhibit A-1, reproduced in earlier pages.

In the first place, it is very difficult to understand how a truck with wheels of a diameter of approximately six inches (R., p. 52), loaded with the trailer wheels weighing over two tons, with the rear wheels of the truck on level floor, could have been started so suddenly on a rough plank floor that the truck would "shoot" forward. The inertia of the load would make it physically impossible for the truck to be moved suddenly, irrespective of the man-power being used to start it forward; but we will not take advantage of that point because we are arguing here upon the assumption that the appellee's testimony is correct in every respect.

Appellee knew that the slope was there. He knew further that the very purpose of his own action and the actions of all of the members of

the crew was to get the truck in motion. His own witness testified that when the truck stalled the efforts of the crew were exerted "to get it moving and keep it moving". (R., p. 69). The witness stated:

> ". . . That is the way it is usually done when the car stuck, we would all push on it and keep it moving; so that it was usual, after the truck was stuck on the floor, to keep it moving straight along if we could." (R., p. 69).

Necessarily, appellee with his own previous experience with the truck appreciated that obvious fact. He knew that the efforts of the crew were being exerted for that very purpose. Consequently, he knew of the risk or hazard created by moving the truck forward.

No individual of mature years is unaware of the effect of the law of gravitation. Every individual knows that water runs down hill. Likewise, every individual knows that a wheel started forward on a slope has a tendency to roll down hill. Consequently, if appellee knew of the existence of the slope, it is certain that he was aware of the risk or hazard created by an attempt to move the truck forward toward the downward slope, when his foot was only six inches in front of the rear wheel.

With the knowledge which appellee had of the purpose of the efforts of the crew and with the knowledge which he freely admits of the existence of the slight slope in the floor, it follows inevitably that he assumed the risk of the accident in so far as it resulted from the existence of the slope in the floor.

B. Charges of Negligence Relating to the Method Adopted to Dislodge the Truck and to Get it in Motion After it Had Become Stalled.

The charges of negligence under this second general heading include:

1. The charge that appellant, after the truck had become "caught" should have directed the use of four crowbars to pry the trailer wheels forward, and should have directed four men thus equipped to work in unison.

2. The charge that appellant's foreman should have warned appellee of the danger of the truck moving forward down the incline.

3. The charge that the foreman should not have directed the appellee to work in the position in which he was at the time of the accident.

In the first place, appellee's testimony already quoted, showed that he had worked many times in moving this loaded truck. His own witness in the testimony quoted above, describes the "usual" method whereby the crew "pushed" to get the truck in motion. If the operation would have been safer if four men had used crowbars (and we submit that there is absolutely no evidence that four men equipped with crowbars would have been safer than four men pushing), it is nevertheless apparent that appellee was familiar with the usual practice to have men push, and assumed the risk thereof.

Where an experienced employee is injured in an operation carried on by the usual and customary method, even though the method adopted may be negligent, he assumes the risks inherent in the use of the method. *Toledo, St. L. & W. Ry. Co. v. Allen,* 276 U. S. 165, 48 S. Ct. 215; *Dibble v. N. Y., N. H. & H. R. Co.,* 100 Conn. 130, 123 Atl. 124; *Cin., N. O. & T. P. Ry. Co. v. Brown,* 158 Tenn. 75, 12 S. W. (2d) 381; *Holz v. Chicago, M., St. P. & P. Ry. Co.,* 176 Minn. 575, 224 N. W. 241; *Louisville & N. R. Co. v. Stewart's Admr.,* 207 Ky. 516, 269 S. W. 555.

There was no duty to warn appellee of a danger of which he was already aware. It is

immaterial how he acquired that knowledge, whether by previous instructions, previous experience, or his own ordinary powers of observation. And there was no duty upon the master to warn of danger if the servant's opportunity to learn of it was equal to the opportunity of the master. *Baltimore & Ohio R. Co. v. Berry*, 286 U. S. 272, 52 S. Ct. 510; *Broughton v. O. W. R. & N. Co.*, 138 Wn. 298, 244 P. 558; *Hopkins v. S. P. & S. Ry. Co.*, 137 Or. 287, 298 P. 914, 2 P. (2d) 1105; *Traffic Motor Truck Corp. v. Clagwell*, 12 Fed. (2d) 419; Labatt, Master and Servant (2d ed.), Secs. 1143, 1144; 39 Corpus Juris 499. And by the fundamental principles of assumption of risk, if there is no duty upon the master to warn of a particular danger because the servant has full knowledge thereof, the servant assumes the risks thereby created.

Appellee's testimony is to the effect that after the truck stopped, he received orders from the foreman to get a bar to use to dislodge the truck. Appellee testified:

> ". . . As near as I can remember, he said, 'Martin, get that bar and put it under the wheel and raise up on it and see if you can get that raised off that high place' ". (R., p. 45).

He proceeded to get a bar which was standing nearby. He testified further:

> "After I got the bar, the foreman did not give me any orders to the use of it after I got over to the truck, he just told me in the first place to take the bar and put it under the wheel and see if we could raise it up." (R., p. 45).

He testified further on direct examination:

> "After I got the bar I put it under the wheel and raised up on it, and the flange is slick on those wheels, smooth and slick, wore that way. They were worn off too much to run on the track any more, and this bar would slip up around the edge of the flange, and so when the bar slipped up, I tried it there a couple of times, and when it slipped up, I moved over so that I could get a hold on it where it would not slip up the side of it, and I did move around next to the axle and got a hold of it and raised up. It slipped off about twice, as I remember. After it slipped off, I did not receive any additional orders from my foreman . . ." (R., p. 46).

On cross examination he testified on the subject of instructions as follows:

> "The only instructions that Morrison gave me were before I got the bar, and after I got the bar, I tried at least twice to pry from a position different from that which I used at the time of the accident. Morrison did not tell me about changing positions. He told me to pry, to put it under and pry." (R., p. 56).

It is apparent from the testimony of the plaintiff himself, then, that the method which he adopted at the time of the accident was of his own selection, that Morrison, the foreman, did not instruct him to take the position which he assumed at the time of the accident, but that he voluntarily placed himself in this place of danger between the wheels without any instructions from the foreman.

It is further apparent from his own testimony that he knew or had the opportunity to know of the danger of taking a position so close to the rear of the two trailer wheels when he knew that the other members of the crew were exerting their efforts to move the wheels forward. He testified on cross examination as follows:

> ". . . At that time I knew that other members of the crew were pushing on the wheels to move it off this place, and I knew that men were in back of me pushing to move it forward, and I knew that when I took my position with the bar, and I expected the wheels to be moved forward to a certain extent, and I knew that that was what the other members of the crew were trying to do, and it did not surprise me at all when that back wheel moved forward in my direction." (R., p. 55).

He testified further:

> ". . . There were seven or eight men working on the job. I could not tell how many men were

on the back, but so far as I knew, everybody was on the job doing as they were supposed to do, and the job of everyone was to move the truck forward." (R., p. 56).

He testified on redirect examination:

". . . At the time the car moved, I knew that there had been a good many men pushing on it with their hands . . ." (R., p. 58).

No warning which could have been given to him by the foreman would have added to the knowledge which appellee already had. There was no negligence on the part of the foreman in directing the appellee to take the position which he assumed at the time of the injury, because of the simple fact that the foreman did not order appellee to take the position which he did. Appellee selected his own position and took it voluntarily without any orders or directions from the foreman.

The facts are simple, and the conclusion that appellee assumed the risk is obvious. Without any instructions from his foreman, he voluntarily placed himself immediately in front of the rear of the two trailer wheels, with full knowledge of the fact that the efforts of seven or eight men were to be exerted at once to move the rear wheel forward in his direction. If a man voluntarily

stands in the path of an object which he knows is to be immediately moved in his direction, he knows that he may be hit, and if the object is heavy, he knows that he may be injured. If he remains in that position until the object reaches him, he assumes the risk of being so injured. There is no difference in principle between this case and one where a man takes a position in the street with his back to approaching vehicles with full knowledge of the fact that vehicles will be operated over the road and over that very portion of the road in which he is standing. A more obvious case of assumption of risk is difficult to imagine.

C. Representative Decisions Involving Similar Facts

In the opening pages of the discussion of this assignment of error we have cited decisions of the Supreme Court of the United States to the effect that the Federal Employers' Liability Act left the defense of assumption of risk as it was at common law. It remains only to cite some additional cases wherein under facts similar to those now before the court the courts have held that an employee assumed the risk.

In this case appellee's own testimony shows

that he voluntarily placed himself in the path of an object which he knew was to be presently moved, and was struck by that object when it was moved. Appellee's position was substantially the same as that of a person who stands between the front and rear wheels of a wagon, pushes the front wheel to move the wagon, and is struck by the rear wheel which necessarily moves simultaneously with the front wheel. We have found no case in the recorded decisions in which an employee thus sustaining an injury sought to hold his employer liable.

However, there are several cases where the courts have held that the servant assumed the risk of being struck by a moving object where the facts were far less favorable to the master than those in the case at bar.

In *Hunt v. Missouri Pacific Railway Company,* 123 Kan. 346, 255 Pac. 70, plaintiff and another employee were engaged in moving pairs of wheels along a dummy track to a point where they were to be loaded by derrick to a flat car. The method adopted was for each man to handle one pair, roll it to the point where it was to be lifted, and then, both working together, to place the derrick

chains on a particular pair of wheels. Plaintiff was handling one pair and his associate was following him on the track with another pair. The only position of danger was astraddle the rail where the flanges of the wheels would strike. There was no danger between or outside the rails. Plaintiff, with his back to the second pair of wheels, straddled the rail and was injured when the pair following, released by the other employee, struck the pair being handled by plaintiff. The court held that since plaintiff was familiar with the method being used and with the fact that the wheels behind were being moved, the danger was open and obvious and plaintiff assumed the risk. A judgment for plaintiff was reversed with directions to dismiss.

The present case is even stronger in support of the defense of assumption of risk. Here appellee not only knew that other employees were engaged in pushing the truck forward, but appellee himself was engaged in the effort to move the wheels, which necessarily involved movement of the rear trailer wheel against his foot.

In *Anderson v. Svehla,* 126 Neb. 584, 253 N. W. 863, plaintiff, an employee of defendant railroad company, was engaged with others in lifting a

heavy freight car bolster to put it in place in a freight car being repaired. The bolster was held up by a jack near the center, which acted as a fulcrum. As other members of the crew raised one end, the opposite end, held by plaintiff to steady it, was lowered and plaintiff was injured. The court held that since plaintiff was familiar with the method being used and since the risks inherent in the method were obvious, plaintiff assumed the risks.

The physical phenomenon of the "see-saw" in the case cited produced risks no more obvious than the danger of standing in front of the rear trailer wheel while attempting to move the truck by pushing on the front wheel.

In *Broughton v. Oregon-Washington Railroad & Navigation Company,* 138 Wn. 298, 244 Pac. 558, an action under the Federal Employers' Liability Act, plaintiff's decedent was killed when he fell from a scaffold while engaged in repairing a bridge. The scaffold was suspended from the side of a pier and its own weight held it against the pier. As cross pieces of the floor of the scaffold were being removed by decedent and another, the scaffold swung against the pier and the decedent

was knocked off. The court held that decedent assumed the risk.

Again, the tendency of a suspended object to act as a pendulum is no more apparent than the tendency of the rear wheel to move forward in the circumstances of this case.

In *New York, C. & St. L. Railroad Company v. May,* 95 Ind. App. 384, 164 N. E. 288, a case under the Federal Act, plaintiff, an experienced section hand, was injured when a telegraph pole being transported on a handcar rolled and struck plaintiff. It was held that he assumed the risk of injury from the rolling of the pole.

Again, the tendency of a round pole to roll when disturbed is no more apparent than the tendency of all wheels of a cart to move when one wheel is pushed.

In *Pennsylvania Railroad Co. v. Brubaker,* 31 Fed. (2d) 939 (6th C. C. A.), plaintiff was working on the handle of an ordinary two-wheel freight truck. Other employees raised a crate to permit plaintiff to insert the plow of the truck under it. As the crate was suddenly lowered, it struck the raised plow and the sudden movement injured

plaintiff. It was held that the risk of injury was assumed by plaintiff.

Again, the tendency of the handles of a truck to move when the plow is struck is no more apparent than the tendency of all wheels of a truck to move simultaneously.

There is a long line of cases in the federal and state courts wherein it has been held that an employee who goes under or about railroad cars or upon or close to tracks when he can anticipate that cars will be moved or trains operated, assumes the risk of injury resulting from the movement of cars and trains. We cite only a few of the representative cases in the federal courts:

Toledo, St. Louis & Western Railroad Co., v. Allen, 276 U. S. 165, 48 S. Ct. 215;

Chesapeake & Ohio Ry. Co. v. Nixon, 271 U. S. 218, 46 S. Ct. 495;

Pennsylvania Railroad Co. v. Bourke, 61 Fed. (2d) 719 (6th C. C. A.);

Biernacki v. Pennsylvania Railroad Co., 45 Fed. (2d) 677 (2nd C. C. A.);

Norfolk & Western Railway Co. v. Collingsworth, 32 Fed. (2d) 561 (6th C. C. A);

Flannery v. N. Y., O. & W. R. Co., 29 Fed. (2d) 18 (2nd C. C. A.);

Kemmerer v. Reading Company, 16 Fed. (2d) 924 (3rd C. C. A.).

These cases, while not close in point of fact, are precisely the same in principle as the case at bar. If an employee voluntarily places himself in the path which he knows a moving object is presently to take, he assumes the risk of injury which results from the movement of that object.

If appellee was engaged in interstate commerce so that the District Court had jurisdiction of this cause, we submit that on the merits the judgment should be reversed and the case remanded with directions to dismiss. The court should have granted appellant's motion for a directed verdict because appellee assumed the risk of injury as a matter of law. This conclusion follows necessarily from an analysis of the facts and an application to the facts of the principles uniformly applied by federal and state courts.

III.

Failure of the Trial Court to Give to the Jury Instructions Requested by Appellant.

In specifications of error Nos. 4 to 7, inclusive, appellant asserts that the trial court erred in refusing to give the jury four instructions to with-

draw from their consideration certain charges of negligence.

If this court determines, as we believe it must, that appellant's motion for a directed verdict should have been granted, there will then be no occasion to consider the errors assigned of the refusal to give the specific instructions now under discussion. However, if the judgment is not reversed with directions to dismiss on either the jurisdictional ground or on the ground that appellant was entitled to a directed verdict, appellant is still entitled to a reversal if any one of the four specific instructions was improperly refused.

A. Specifications of Error Nos. 4 and 6.

In the two requested instructions, the subject of these two specifications of error, appellant requested the court to withdraw from the jury the first and third charges of negligence stated in the complaint. (R., p. 8). These two charges, though phrased somewhat differently, both ascribe to appellant negligence with respect to the condition of the roundhouse floor and the truck being used to transport the trailer wheels.

In substance the instructions requested stated

that the risks and dangers which arose from the condition of the floor and the truck were known to appellee and that he assumed those risks.

We need not repeat here the testimony quoted in the course of our discussion in earlier pages of the question of assumption of risk. Appellee's own statements show that he was fully advised of the hazards created by the condition of the floor and the truck. The testimony discloses without question that appellee assumed those risks. The jury should not have been permitted to base a verdict for appellee on the charges of negligence relating to those conditions.

B. Specification of Error No. 5.

In this specification we assert that the court should have given the requested instruction to withdraw from the jury the second charge of negligence in the complaint. (R., p. 8). Therein appellee charged that defendant should have directed four men to use crowbars to dislodge the truck after it had stalled.

Our argument in earlier pages shows that the method usually adopted when using the truck to transport wheels was in fact used on this particular occasion. Furthermore, the authorities we

have cited establish that an experienced employee assumes the risks necessarily attendant upon a customary method with which he is familiar.

Again, whatever the disposition by this court of other assignments of error, the judgment must be reversed, because in no event should the jury have been permitted to base a verdict on appellee's second specification of negligence.

C. Specification of Error No. 7.

This specification relates to the refusal to withdraw from the jury appellee's fourth charge of negligence, the failure to warn appellee of the danger that the truck would move forward "down said incline", and the negligence in directing appellee to work in the position he assumed. (R., pp. 8, 9).

In the first place, as we have shown, the testimony of appellee failed to prove that he was directed to take the position in which he was working. He selected the position himself without any suggestion or direction from the foreman.

Furthermore, as has heretofore been shown, there is no duty upon the master to warn a servant of obvious dangers or of dangers of which he is

aware from information from any source. Consequently, a failure by the master to give a warning in such a situation is not culpable, and cannot be the basis for recovery by an injured servant.

The error in refusing to withdraw this charge of negligence from the jury is sufficient in itself to require a reversal.

CONCLUSION

Appellant respectfully submits that the district court was without jurisdiction of this action, because it appears clearly that appellee was not engaged in interstate commerce at the time of the injury complained of. The judgment should therefore be reversed and the action dismissed for want of jurisdiction.

Appellant further submits that no cause of action exists under the Federal Employers' Liability Act, if that statute is applicable at all, because appellee clearly assumed the risk from which his injury resulted. But if upon any theory it can be said that there was a jury question as to appellee's assumption of the risk, we think it clear that the trial court erred in refusing to give the instructions referred to in the Specifications of

Error, and that for this reason also the judgment against appellant should be set aside.

Respectfully submitted,

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